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NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

*1 PHOENIX PROCESSOR LIMITED PARTNERSHIP
AND
BRADLEY BAGSHAW

19-CA-28831

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 4, 2005, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent, General Counsel, and the Charging Party each filed exceptions and supporting briefs. The Respondent and Charging Party also filed answering briefs, and all parties filed reply briefs in response to answering briefs.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order.[4]

The judge found that the Respondent violated

Section 8(a)(1) of the Act by discharging 23 fish processors[5] for engaging in a work stoppage on board a ship. The judge found that the employees were not seamen, and thus their concerted failure to obey the order of the captain and factory manager to return to work was not a violation of maritime law, which violation would privilege the Respondent to discharge them under *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942). Contrary to the judge, we find, as explained below, that the processors were seamen.[6] As such, they were not entitled to engage in a concerted shipboard work stoppage (see *Southern Steamship*) and therefore their discharges did not violate the Act as alleged.[7]

I. BACKGROUND

The Respondent operates the 680-foot Ocean Phoenix, a ship that operates in the Bering Sea and processes pollock into a food product called surimi. The Respondent's processors worked in the ship's factory, operating machinery that stores, sorts, cuts, freezes, and packs the product. The ship operates during certain parts of the year, divided into "A" and "B" seasons. Prior to 2003, processors worked 16-hour shifts during "A" season.

In January 2003,[8] after the Respondent's ship left port at the beginning of "A" season, the Respondent's factory manager Pat Hermens held a meeting with all the processors to review company policies. At this meeting, Hermens told the processors that they would be working an extra half hour that season, extending their normal shifts from 16 to 16.5 hours.

Once the extended schedule was implemented, some of the processors began discussing their dislike of the longer 16.5-hour shift. Thereafter, a petition, addressed to Hermens, was circulated among the processors. The petition expressed the processors' concern about the longer shift, and requested that they return to working a 16-hour shift. It was signed by 70 employees. The processors believed that the petition was delivered to the ship's purser (the captain's top administrative official) sometime in late January. The record, however, does not establish to whom the petition was delivered. The record does show that Hermens never saw the petition.

*2 On February 2, the processors had some downtime due to a temporary lack of fish. After cleaning machinery, a group of processors-having heard nothing from Hermens regarding their petition-composed an anonymous letter about the 16.5-hour work schedule, entitled "Voice of the People." Processor Luis Verduzco, Sr. gave the letter to a foreman, who gave it to Hermens. Hermens was enraged by the letter. Verduzco was directed to come to Hermens' office, where Hermens demanded to know "what is the meaning of this" and "who wrote this."[9] Verduzco gave no information in response. Hermens told Verduzco that he was willing to meet with the employees and discuss the issue when he had time. However, the judge found that no specific meeting time or date was set.

At that point, the ship had received more fish, and Hermens was set to begin a series of meetings that preceded the restart of the factory. The processors, however, had been told by Verduzco that Hermens

would meet with them, and they asked foreman Estrada if they could meet with Hermens immediately. The processors understood Estrada to have told them that Hermens would meet with them immediately, but Estrada understood that he had only told the processors that assistant factory manager Evan Rafferty would speak to Hermens about setting up a meeting. Based on their belief that Hermens was ready to meet with them, approximately 25 employees left the factory.[10] Thereafter, Rafferty informed Hermens that several processors had left the factory, and Hermens instructed him to make arrangements to replace the departed processors and start up the factory. Afterwards, Rafferty encountered the group of processors in a hallway and told them they were fired. Rafferty told them to take off their gear and to go to the library and wait.

Hermens then asked Captain Marc Smith to go to the library and speak to the processors. Smith went to the library and told the processors to return to work. The processors, however, remained in the library, in response, Smith had them sign their names on a sheet and told the processors that he considered them to have quit. Smith then returned to Hermens and they discussed the situation, after which they both went back to the library. Smith and Hermens both told the processors that they should go back to work, that their concerns would be discussed when there were no fish to process, and that if they returned to work immediately, there would be no penalty. Except for two or three who then returned to work, the processors refused to return to work, insisting they would remain there to discuss the shift

schedule with Smith and Hermens. The processors who remained were told by Smith that they had quit. The next day, the ship detoured to Dutch Harbor, Alaska, where the processors were put ashore. Their separation notices stated that they "quit" and were not eligible for rehire.

Concerning the reason for the processors' termination, Captain Smith testified without contradiction that "a group of close to 25 individuals that are familiar with the ship that are obviously, unhappy ... could very easily become a serious situation."

II. THE JUDGE'S DECISION

***3** The judge found that the Respondent violated Section 8(a)(1) by discharging the processors on February 2 for engaging in a protected, concerted work stoppage. In so finding, the judge found the instant circumstances distinguishable from those in *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942), which held that seamen engaged in a concerted shipboard work stoppage were not protected by the Act because their conduct violated federal maritime law. The judge found that, unlike the crew in *Southern Steamship,* the Respondent's processors were not seamen because they were not directly involved in the operation of the vessel. Accordingly, the judge found that they were not prohibited by maritime law from engaging in a concerted work stoppage, and thus their resulting discharge violated the Act.

III. CONTENTIONS OF THE PARTIES

All the parties except to the judge's finding that the processors were not seamen. The parties disagree, however, whether the refusal of the processors to return to work was protected by Section 7 of the Act. The Respondent contends that because the processors were seamen, their refusal to return to work violated maritime law, and thus, under *Southern Steamship*, supra, their conduct was not protected by the Act. The General Counsel contends that, although the processors were seamen, they were nonetheless unlawfully discharged by Rafferty for their protected, concerted activity. After they were discharged, according to the General Counsel, they ceased to be seamen, and thus their subsequent failure to return to work after the discharge could not have violated maritime law. Lastly, the Charging Party contends that the processors' work stoppage was protected Section 7 activity because it did not constitute the type of mutinous behavior that violated maritime law in *Southern Steamship*. Thus, the issues presented by the parties' exceptions are (a) whether the processors were seamen, (b) whether they were discharged by Rafferty prior to their concerted refusal to return to work,[11] and (c) if they were not discharged by Rafferty, whether the processors' work stoppage was protected under the Act.

For the following reasons, we find that the Respondent's processors were seamen, that they were not discharged by Rafferty, and that their concerted work stoppage was not protected under the Act.

IV. ANALYSIS

A. Seaman Status

We agree with the parties that the processors were seamen. In *Chandris v. Latsis*, 515 U.S. 347, 368 (1995), the Supreme Court stated that, in order to be a seaman, an individual "must contribute to the function of the vessel or to the accomplishment of its mission," and "must have a connection to a vessel in navigation ... that is substantial in terms of both its duration and nature." In other words, the employee must "do the ship's work." Id. "This element of the *Chandris* test for seaman status broadly encompasses many individuals who would not ordinarily be thought of as a seaman." *FJC: Admiralty and Maritime Law* 91 (2004) (citing *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973); see also *Benedict on Admiralty*, 7th Ed. (1990) Vol. 1B, pp. 2-28-2-35 (table of cases indicating seaman status for, e.g., bartenders, cooks, dancers, maids, and handymen).

*4 It is thus apparent that courts, whose duty it is to interpret maritime law, have defined seamen to include a broad range of shipboard employees. Applying this standard, we find that the record establishes that the processors were seamen. The function of the Ocean Phoenix was to process fish, and the processors performed this function continuously. Further, the processors' connection to the vessel while in navigation was substantial in duration and nature, as evidenced by the fact that they lived and worked aboard the ship while it was

at sea. In finding that the processors were not seamen, the judge relied on the fact that the processors did not operate the vessel. However, under *Chandris* and the well-developed law noted above, this fact does not remove an individual from the definition of a seaman. As noted, a seaman "must contribute to the function of the vessel or to the *accomplishment of its mission*" (Emphasis added). Thus, we find, in agreement with all the parties, and contrary to the judge, that the processors were seamen under maritime law.

B. Alleged Discharge Before the Work Stoppage

We next turn to the issue of whether the processors were discharged by Rafferty. According to the General Counsel, even though the processors were seamen, they had not engaged in a work stoppage when Rafferty fired them. Although the General Counsel does not clearly state what their protected concerted activity was, we infer that the General Counsel contends that the protected concerted activity consisted of the employees' leaving the factory on the belief that they were to meet with Hermens. Thus, according to the General Counsel, they were unlawfully discharged, and ceased to be seamen. Under this theory, because the terminated processors were no longer seamen subject to maritime law, their refusal to return to work could not have violated maritime law.[12] In support of this position, the General Counsel contends that Rafferty's statement to the processors that "you're fired" would "reasonably lead the employees to believe that they had been discharged." *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844,

846 (2001) (quoting *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967). The General Counsel acknowledges, however, that an employer who initially leads employees to believe that their employment has been terminated may disavow such statements or clarify that the employees are, in fact, still employed. *Kolkka Tables*, supra at 847. We find that statements made subsequent to Rafferty's did, in fact, clarify that the processors were still employed.

As noted above, immediately after Rafferty made his "you're fired" comment, both Smith and Hermens told the processors that they could return to work with no penalty. Thus, even assuming that the processors reasonably believed Rafferty's statement, "you're fired," any such belief would have been dispelled once Smith and Hermens informed the processors that they could return to work with no penalty. Indeed, these assurances by Smith and Hermens demonstrate that there was "no reasonable basis for finding that anyone was discharged" by Rafferty. *Pink Supply Corp.*, 249 NLRB 674 fn. 2 (1980). Further, the fact that two or three processors did return to work with no penalty also demonstrates that the processors understood that they had not been fired by Rafferty. Accordingly, we find the Respondent did not terminate the processors prior to their concerted work stoppage. It follows that there was no unlawful discharge and that they remained seamen.

C. Applicability of Southern Steamship

*5 Having found that the processors were seamen

and subject to maritime law, and having further found that the processors were not discharged prior to refusing to return to work, we now address whether the processors' refusal to return to work was protected by Section 7 of the Act. As stated above, the seminal case concerning whether a work stoppage of seamen is protected by Section 7 of the Act is *Southern Steamship*, supra. In that case, the crew went on strike while the ship was loading at the dock. The employer discharged the strikers for refusing to obey the captain's order to return to work, but the Board found the discharge violated the Act and ordered them reinstated. 23 NLRB 26 (1940). The Supreme Court held, however, that the Board had no authority to reinstate the employees in these circumstances. The Court held that the strike was in violation of maritime law because the seamen engaged in mutiny and incitement of mutiny when they disobeyed the captain's order to return to work. 316 U.S. 31 at 48. The Court thus found "that the strike was unlawful from its very inception." Id.

In this case, the processors, like the crewmen in *Southern Steamship*, were seamen and, as such, subject to maritime law which establishes the necessity of following an order to return to work. The processors, like the *Southern Steamship* crew, engaged in a concerted work stoppage aboard the ship, were told to return to work, and subsequently refused. Thus, the operative facts in this case are indistinguishable from those of Southern Steamship.[13] In that case, the refusal of the seamen to return to work was not protected by Section 7 of the Act. Because the processors here engaged in essentially the same activity as the crewmen in

Southern Steamship, their concerted work stoppage was also unprotected.[14]

The dissent attempts to distinguish *Southern Steamship* on a number of grounds. First, the dissent asserts that *Southern Steamship* is inapplicable because the employees here did not sign shipping articles (which include an agreement to obey superior officers) and, as at-will employees, they are categorically different from the striking employees in *Southern Steamship*. We disagree. As noted above, all parties to this case agree that these employees are seamen. As such, they are subject to maritime law. Thus, we find the absence of shipping articles in this regard not controlling. Indeed, the presence or absence of shipping articles is irrelevant to the NLRA case. What is relevant is whether the employees' conduct was protected under Section 7 of the NLRA. That issue, in turn, must be considered in the context of other federal laws, e.g. maritime laws. This is not to say that maritime laws dictate the NLRA answer. We simply find, on balance, that the policies of those laws, i.e. to compel seaman to obey lawful orders from their supervisors, outweigh the policies of the NLRA.

***6** In any event, the processors did sign employment agreements, which, like shipping articles, contain essential terms of employment.[15] Indeed, these contracts impose a requirement to obey the ship's officers, as did the shipping articles in *Southern Steamship*.[16] In addition, the dissent's reliance on the at-will status of the processors is beside the point. The "at will" relationship permits an employer to terminate the employment for lawful reasons, and

it permits an employee to terminate the relationship for lawful reasons. It does not render the employees protected under the NLRA, and it does not forbid an employer from discharging the employees for unprotected conduct under the NLRA.

The dissent, like the Charging Party, also contends that the processors were never ordered to return to work, but rather were only asked to do so, and thus they did not refuse to obey a lawful order. We disagree. As noted above, there is no doubt that Smith and Hermens told the employees that their job duties required them to end their work stoppage and return to the factory. For example, Smith testified: "I mean, from the very beginning, it was, go back to work and I phrased it every possible way you could phrase it, to get them to go back to work." Hermens' notes of the meeting state that he told the processors "that they had left work without permission," and that "he was not going to be held hostage" by the processors' demands. Thus, regardless of whether they used the word "order,"[17] Smith and Hermens made clear that in order to remain employed, the processors had to return to work.

On another issue, the dissent cites a case to support the contention that seamen may engage in protected shipboard work stoppages while at sea. That case, *Pantex Towing Corp.*, 258 NLRB 837 (1981), is clearly distinguishable. *Pantex* concerned a tugboat that was docked at the bank of Mobile Bay, where the tugboat crew of four, including the captain, engaged in a work stoppage in order to gain recognition of a union. When the employer showed up and demanded that crew members leave the boat,

the crew members left. One of the crew was subsequently discharged. The Board, adopting the judge's recommended finding that the work stoppage was protected, distinguished *Southern Steamship* and found there was no evidence any employee had defied the employer. Rather, when told to do so, the employees left the tugboat. Here, by contrast, the employees refused multiple directives to return to work. Thus, the defining act of *Southern Steamship* and this case, a seaman's refusal to obey a directive to return to work, is absent from *Pantex*.

*7 The dissent further suggests that because there is no evidence that the Respondent took steps to impose maritime discipline under maritime law, the Board should not "entertain" the Respondent's defense that the discharges were lawful. We disagree. As stated above, no party contends that the processors were entitled to disobey the Respondent's directive to return to work. Further, we note that in *Southern Steamship*, there was no evidence of any discipline under maritime law, either. Thus, the existence of evidence of maritime discipline, or the lack thereof, is not a controlling fact in determining whether the processors' conduct was unprotected.

Finally, the dissent's contention that we are applying *Southern Steamship* broadly, reflexively, and in a way that cuts off important rights of employees misses the mark. We agree with the dissent that *Southern Steamship* does not require that the Act always yield to other federal statutes. However, the necessary accommodation between the Act and maritime law that arises in the context of shipboard work stoppages was resolved long ago in *Southern*

Steamship. in this case, with the same material facts, we are bound by the Supreme Court's clear precedent. Accordingly, we find that the Respondent did not violate the Act when it discharged the processors for refusing to return to work, and we dismiss that portion of the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Phoenix Processor Limited Partnership, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their protected, concerted activity within the meaning of Section 7 of the Act.

(b) Discharging employees because they engaged in protected, concerted activity within the meaning of Section 7 of the Act.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ulysses Nieto and Sebastian Cortez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions,

without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Ulysses Nieto and Sebastian Cortez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any references to Nieto's and Cortez' discharges, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

*8 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Seattle, Washington, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous

places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 31, 2006

Robert J. Battista
Chairman

Peter C. Schaumber
Member

[1] The Respondent has requested, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), that a copy of an unpublished decision of the Washington State Court of Appeals, *Cornelio v. Premier Pacific Seafoods*, Case No. 54445-4-1, May 23, 2005, a case stemming from the relevant events here, be inserted into its Brief in Support of Exceptions. We find the request to be in compliance with *Reliant Energy*, and shall

accept the copy of the decision. However, having considered the decision, we find that it does not constitute persuasive authority. Two of the issues involved in *Cornelio*, breach of contract and a federal statutory claim concerning insufficient terms of compensation in a maritime contract, have no bearing on the issues presented in this proceeding. The other issue in that case, whether the processors were wrongfully discharged because they protested unsafe working conditions in violation of public policy, is not relevant because it does not address whether the processors' protest might constitute protected, concerted activity under Sec. 7 of the Act.

[2] The Respondent, General Counsel, and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall amend the judge's conclusions of law to delete an inadvertent finding with regard to "the Union," as there is no union involved in this case.

[4] We shall modify the judge's recommended Order and Notice to more closely reflect the violations found and to conform to the Board's standard remedial language.

[5] The judge amended the complaint to add the names

of two individuals who were not named in the original complaint, but whom the judge found were part of the group of 23 discharged employees. The Respondent has excepted to this amendment, arguing that the record does not indicate whether these two individuals were similarly-situated to the other 23. Because we find that the 23 employees were not unlawfully discharged, we find it unnecessary to reach the issue of whether the amendment was proper.

[6] Although the General Counsel and Charging Party agree with the judge that the discharges violated the Act, like the Respondent, they except to the judge's finding that the processors were not seamen.

[7] We adopt the judges' findings of other violations. In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging employee Ulysses Nieto for engaging in protected concerted activity, we note that the Respondent has not argued that Nieto was discharged for lying to his foreman about the reason he went to his quarters. We further note that the Respondent's performance-related justifications for Nieto's discharge are contradicted by Nieto's highly favorable performance evaluation and otherwise unsupported by the record. In adopting the judge's finding that employee Sebastian Cortez was discharged for engaging in protected concerted activity, we note that the record shows that the Respondent clearly understood that Cortez had been talking to other employees about wages and hours, and discharged him to prevent any further such discussions among employees.

[8] All dates are in 2003, unless stated otherwise.

[9] In adopting the judge's finding that Hermens unlawfully interrogated Verduzco, we note that the Respondent does not argue that Hermens' conduct in this regard was privileged under maritime law.

[10] The judge did not resolve this discrepancy between what the processors testified Estrada told them and what Estrada testified he told them. Rather, the judge found that a misunderstanding occurred. The General Counsel argues that the judge should have credited testimony that Estrada told the processors that Hermens would meet with them immediately. Because we find below that the processors were not fired and could have returned to work with no penalty, we find it unnecessary to pass on the General Counsel's argument.

[11] The General Counsel does not contend that the Act's protections extend to seamen engaged in a work stoppage while at sea.

[12] In light of our finding below that the processors were not terminated by Rafferty for engaging in protected, concerted activity, we find it unnecessary to pass on whether this is a correct statement of maritime law.

[13] No party contends that maritime law allows a seaman to disobey the lawful order of the master of a vessel. See 46 USC § 11501; 18 USC § 2192; and 18 USC § 2193.

[14] Prior Board cases that found seamen's conduct

protected are clearly distinguishable, as none of them concerned an outright refusal to return to work. See *Sea-Land Service*, 280 NLRB 720 (1986), enf. denied, 837 F.2d 1387 (5th Cir. 1988) (finding unlawful interrogation when captain demanded to know why employee had sought information regarding the Board's regional office while the employee made routine radio transmission); *Pantex Towing Corp.*, 258 NLRB 837 (1981) (finding unlawful discharge of tugboat employee on strike, noting absence of any evidence that employees disobeyed tugboat master) (discussed further below); *Mr. Vernon Tanker Co.*, 218 NLRB 1423 (1975), enf. denied, 549 F.2d 571 (9th Cir. 1977) (finding violation for failure to allow a *Weingarten* witness during disciplinary meeting).

[15] Maritime law requires that "the owner, charterer, or managing operator, or a representative thereof, including the master or individual in charge, of a ... fish processing vessel ... shall make a fishing agreement in writing with each seaman employed on board" 46 U.S.C. § 10601 (a).

[16] The processors' agreements stale they "will perform such duties at the direction of the employer, Master, Manager, Supervisor or other person designated by the owner or Master."

[17] Contrary to the dissent's contention, the fact that Smith and Hermens told the processors at one point that they "could" go back to work clearly was not to minimize the Respondent's insistence that the processors return to work, but rather to underscore that they were still employees and would not be disciplined if they ended their work stoppage. They

did not do so.

[18] If this Order is enforced by a judgment of a United States Court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

*9 MEMBER LIEBMAN, dissenting in part.

The employer here discharged 25 workers who walked off the job to meet with management and explain their objections to a lengthened work day: a work day now sixteen-*and-a-half hours* long. Had the work stoppage in this case occurred *on land*, the protections of the National Labor Relations Act clearly would have applied and the workers' discharge would have been illegal.[1] Instead, however, the work stoppage took place aboard a ship, a floating fish-processing factory. The majority finds no violation, concluding that federal maritime law-which generally requires seamen to obey their superiors' orders-overrides Federal labor law. Unlike the majority, I do not believe that the Supreme Court's *Southern Steamship* decision[2] compels this result.[3]

The Board has previously observed that "*Southern Steamship* did not hold that the antimutiny statute prohibits the application of the Act in a maritime setting." *Sea-Land Service*, 280 NLRB 720, 721 fn. 5 (1986), enf. denied, 837 F.2d 1387 (5th Cir. 1988).

The *Sea-Land* Board cited the Supreme Court's own observation that *Southern Steamship* did not require the National Labor Relations Act to yield automatically to other Federal statutes. Rather, as the Supreme Court has said, the Board must make an "independent inquiry into the requirements of its own statute." *Local 1976, United Brotherhood. of Carpenters v. NLRB,* 357 U.S. 93, 111 (1958). Accommodation of two Federal laws thus may require compromise in both directions. In *Southern Steamship,* the Board had argued that federal maritime law was entirely irrelevant to its authority to remedy the unfair labor practice in the case. The Supreme Court rejected this view, instead requiring the "*careful* accommodation of one statutory scheme to another." 316 U.S. at 47 (emphasis added).

Accordingly, the Board has paid close attention to the facts of *Southern Steamship* in deciding how to apply our statute at sea. In *Pantex Towing,*[4] for example, the Board found that a shipboard strike was protected by the Act, rejecting the employer's argument that it amounted to mutiny. The Board adopted the decision of the administrative law judge, who distinguished *Southern Steamship* on its facts, observing that the strikers there "had intended to wrest control of the vessel from those in lawful command." 258 NLRB at 844.

***10** In *Southern Steamship,* a divided Supreme Court explicitly found that a strike had violated the Federal mutiny statutes (part of the criminal code), because crew members-who had signed "shipping articles" under which they agreed to obey their superior officers- "[d]eliberately and persistently ....

defied direct commands to perform their duties in making [the ship] ready for departure from port;" in other words, crew members "did what they could to prevent the ship from sailing." 316 U.S. at 38-41.

The facts here are very different from *Southern Steamship*. First, the striking fish-processors had never signed shipping articles. Instead, the processors' contracts included an at-will employment clause, explained to them by the Respondent as meaning "that either the company or the employee can terminate employment with or without cause, and with or without notice." This at-will status would seem to distinguish the processors from the articled members of a ship's crew. It also calls into question the applicability of the maritime statutes upon which the majority relies to find the work stoppage unprotected.[5]

Second, it is not at all clear that the processors were ever given an actual order to return to work, rather than simply being offered the opportunity to return to work if they wished. Under cross-examination, the ship's captain (Smith) admitted that he understood that, as at-will employees, the processors had a right to quit, and once that right was exercised (as he believed it had been), he lacked authority to order them to perform their duties. Neither the notes of the captain, nor those of the factory manager (Hermens)- prepared soon after the incident- mention ordering the processors to return to work. Instead, the notes state the processors were told that "they could return to work," either with or without penalty for their participation in the work stoppage. Factory manager Hermens admitted, consistent with his testimony at

a prior unemployment-compensation hearing, that "I can't testify that I told them" to go back to work.

Here, the processors' alleged violation of the maritime statutes was an affirmative defense to the unfair labor practice charges. In *Pantex Towing*, supra, the Board demanded "clear and convincing proof" of such a violation. Such proof is missing from the record in this case.[6] The majority, then, is much too quick to conclude that the "processors here engaged in essentially the same activity as the crewmen in *Southern Steamship*." The processors had not signed shipping articles, and they did not "deliberately and persistently def[y] direct commands," in the words of the *Southern Steamship* Court.

*11 It is telling that no steps were ever taken by the Respondent, or by any legal authority, to impose maritime discipline against the processors. No adjudicator, except the Board today, has ever found them guilty of an offense. And given the apparent failure of the Respondent to comply with the procedural requirements for imposing maritime discipline, it is not clear that the Board should even entertain the Respondent's defense. See 46 U.S.C. § 11502(d) (where vessel's officers fail to make entry in logbook detailing offense, a "court may refuse to receive evidence of the offense" in a "subsequent legal proceeding").

Certainly, there are limits to the Act's protection of strikes.[7] In applying established, general principles to concerted activity at sea, we must take into account the unique environment that a ship

represents and the challenges involved in its operation-i.e., the factors that inform maritime law. Nevertheless, where a brief, peaceful shipboard work stoppage involves employees who play no role at all in navigation, and where those employees do nothing to interfere with the work of the crew or otherwise to cause imminent danger to the operation of the ship, we should find the strike protected.

Southern Steamship has been sharply criticized for restricting the labor-law rights of seamen, in favor of an older, harsher legal regime and for undercutting application of the National Labor Relations Act in other contexts where it intersects with potentially competing federal statutes.[8] We are bound by that decision, nevertheless. But we are not required, as the majority does, to read the decision broadly or to apply it reflexively. The Board has rejected such an approach before, and it should do so here. Accordingly, I dissent.

Dated, Washington, D.C. August 31, 2006

Wilma B. Liebman
Member

[1] See, e.g., *Accel, Inc.*, 339 NLRB 1052 (2003) (spontaneous work stoppage by assembly line workers to protest denial of scheduled work break was protected).

[2] *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942).

[3] I concur in the majority's finding that the

Respondent violated Sec. 8(a)(1) by interrogating employee Luis Verduzco Sr. and by discharging employees Ulysses Nieto and Sebastian Cortez. I also concur with the majority that, contrary to the judge's finding, the employees involved here were seamen for the purposes of Federal maritime law. All the parties agree on this point.

[4] *Pantex Towing Corp.*, 258 NLRB 837 (1981).

[5] The mutiny statutes, notably, apply to "the crew of a vessel." 18 U.S.C. §§2192, 2193. Other offenses, in turn, would seem to be entirely precluded by at-will status, for example, desertion, absence without leave, and quitting the vessel without leave. See 46 U.S.C. §§11501(1), (2), (3).

The majority views the "at will" status of the processors as irrelevant. But it apparently was *not* irrelevant to the Respondent. The record suggests that the Respondent viewed the processors as a distinct, and troublesome, group, given their suspected propensity for concerted activity. In an e-mail sent after the processors' petition was circulated, but *prior* to the work stoppage, factory manager Hermens observed that there were "a number of folks that we think we will be sending home mid trip" and that they would be replaced with a "diverse group of Midwestern folks." (The processors were largely Hispanic.) The "at will" status of the processors, it seems, allowed the Respondent to contemplate "sending home" employees "mid trip" without legal or operational repercussions.

[6] Indeed, the facts are analogous to those considered

in *Pantex Towing*. There, the only order given to the striking seaman (with which he immediately complied) was "if you are not going to move the boat or barge, you will have to get off the barge and the boat." 258 NLRB at 841. The judge in *Pantex* analyzed the situation by explaining that "[a]ssuming that [the owner] was tendering the option to [the seaman] that he either take [the boat] upriver or leave the boat, [the seaman's] election of the latter alternative fails to rise to that of disobedience since it was mere exercise of an option accorded by [the owner]." Id. at 843. The processors here likewise obeyed the Respondent's decision to remove them from the ship, once they made clear their decision to stop working.

[7] See generally *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (Act does not protect concerted activity that is "unlawful, violent or in breach of contract" or is otherwise "indefensible"). The Board, for example, has found strikes unprotected when striking employees fail to take reasonable precautions to protect the employer's operations from imminent danger foreseeably resulting from their sudden cessation of work. See, e.g., *International Protective Services*, 339 NLRB 701, 702-704 (2003) (unprotected strike by security guards at Federal buildings). See also *Bethany Medical Center*, 328 NLRB 1094, 1095 (1999) (protected strike by catheterization laboratory employees).

[8] See Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 Berkeley J. Emp. & Lab. L. 275 (2004).

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

*12 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT coercively question employees about their protected concerted activity within the meaning of Section 7 of the Act.

WE WILL NOT discharge employees because they engage in protected concerted activity within the meaning of Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Ulysses Nieto and Sebastian Cortez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ulysses Nieto and Sebastian Cortez whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Ulysses Nieto and Sebastian Cortez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

PHOENIX PROCESSOR LIMITED PARTNERSHIP

Joann Howlett, Atty., for the General Counsel.

David Bratz and *Gail M. Luhn, Attys. (LeGros, Buchanan, & Paul)*, of Seattle, Washington, for the Respondent.

Bradley H. Bagshaw, Atty., of Seattle, Washington, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge.

This matter was tried in Wenatchee, Washington, on October 26 through 29, 2004,[1] and in Seattle, Washington, on November 8 and 9, 2004, upon complaint and notice of hearing (the complaint) issued June 24, 2004, by the Regional Director for Region 19 of the National Labor Relations Board (the Board) based upon charges filed by Bradley H. Bagshaw, attorney (the Charging Party), and upon amendment to the complaint issued October 7, 2004.[2] The complaint, as amended, alleges Phoenix Processor Limited Partnership (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Does the Board have subject matter and personal jurisdiction over Respondent?

2. Does Federal Maritime Law preempt Board consideration of the complaint issues?

***13** 3. Did Respondent violate Section 8(a)(1) of the Act by interrogating employees about their concerted protected activities?

4. Did Respondent terminate employees because they engaged in concerted protected activities and to

discourage other employees from doing likewise?

III. JURISDICTION

Respondent, a State of Washington corporation, with an office and place of business in Seattle, Washington, has, at all relevant times, been engaged in the business of seafood processing. During the 12-month period prior to the hearing, a representative period, Respondent annually sold and shipped goods or provided services valued in excess of $50,000 to customers inside the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel, the Charging Party, and Respondent, I make the following

IV. FINDINGS OF FACT

A. Commencement of Respondent's 2003 "A" Season

Respondent operates the *S/S Ocean Phoenix (the Phoenix)*, a 680-foot steam-driven vessel operating primarily in the Bering Sea. *The Phoenix* serves as a floating fish-processing factory, the base for a small fleet of trawlers, which delivers its catch (primarily Pollack) to *the Phoenix*. After delivery to the ship, fish undergo an "aging" process in water tanks for a

period of 5 to 9 hours depending on factors such as fish size. After the fish are aged, depending on the time of year, factory employees extract Pollack eggs (roe), process the Pollack into Surimi, a fish paste or cake with preservatives, and store the product for later delivery to other processing plants that may subsequently turn it into such fish products as imitation crab. During processing aboard *the Phoenix*, the fish are moved from one processing stage to another by conveyors, and the end product is ultimately boxed and stacked in walk-in freezers. The process from initial stage to freezer takes about 2 hours.

The Phoenix makes two processing voyages, or "seasons" a year. "A" season, in which roe are harvested, begins in mid-late January and lasts about 60-90 days or until the company fills its harvest quota. "B" season begins in late summer and lasts until mid-late fall, or until that season's quota is filled.[4] Prior to the 2003 "A" season, processing employees during the "A" season worked, as necessary, 7 days a week in 16-hour shifts with a one-half hour lunchbreak, mid-shift, and two 15-minute breaks, pre and postprandial. During the "B" season, in which the work is less labor intensive than in the "A" season, processing employees work 12-hour shifts.

Respondent compensates its hourly processing employees through a formula based on production or by a guaranteed base rate. The formula provides for payment of a unit rate for each metric ton of frozen product. The unit rate is set at the beginning of each voyage. The employee share, expressed in percentage

points, varies depending on the type of product and increases with employment longevity. If, at the end of a voyage, compensation based on production (the production wage) is greater than the base wage, Respondent pays the production wage.

*14 Prior to the 2003 "A" season, Respondent decided to increase the "A" season factory shifts by one-half hour, making each shift 16-1/2 hours in duration. Respondent notified former processing employees by letter of its projected start date for the 2003 "A" season but said nothing of the prospective shift duration increase.[5] Individuals desiring employment went to Respondent's Seattle office where they signed an employment contract before boarding *the Phoenix*. Inter alia, the contract for the relevant period provided:

> 1. DUTIES. Employee shall perform his/her duties as requested by the owner, whether written or oral, in connection with the ship's operating and processing activities ... at the direction of the employer, Master, Manager, Supervisor or
> 2. other person designated by the owner or Master .... Failure to perform any of the duties as assigned may result in disciplinary action up to and including termination.
> 3. CERTIFICATION OF PHYSICAL CONDITION. Employee understands that working conditions aboard the ship are difficult, strenuous and sometimes hazardous and that working hours are often long. Employee has considered these factors before making a decision to accept this employment.

> Employee represents and warrants to the best of his/her knowledge, that he/she is physically and mentally prepared and able to perform all assigned work for the term of this agreement and that all statements contained in the medical forms furnished are true and accurate in all respects.
>
> ....
>
> 15. GOVERNING LAW/FORUM. The parties agree that this contract shall be interpreted and enforced in accordance with maritime law of the United States of America, and that the venue for any lawsuit arising from or related to Employee's employment by owner, including but not limited to claims for wages, violation of state and/or federal laws, including laws against discrimination and/or harassment, and also including claims arising under the Jones Act or maritime law, for transportation, maintenance and cure, damages or otherwise, arising out of or in any way connected with any event, happening, injury, disability and/or illness occurring to and/or sustained by employee while employed aboard the vessel shall be only in U.S. District Court, Western District of Washington at Seattle, or the King County Superior Court, State of Washington at Seattle. ...

The 2003 "A" season work commenced while *the Phoenix* was docked in Seattle, where processing employees worked 12-hour shifts for several days loading and preparing the vessel for the season. At all relevant times, the following individuals in the following respective positions, served aboard *the*

Phoenix as supervisors within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:[6]

Marc Smith (Capt. Smith)-Ship's Captain
Pat Hermens (Mr. Hermens)-Factory Manager
Evan Rafferty (Mr. Rafferty)-Assistant Factory Manager
*15 Oscar Octaviano (Mr. Octaviano)-Foreman
Jose Estrada (Mr. Estrada)-Foreman
Juan Aldana (Mr. Aldana)-Foreman
Jose Rojas (Mr. Rojas)-Assistant Foreman[7]
Esteban Berrera (Mr. Berrera)-Assistant Foreman

At all times relevant, the foremen and assistant foremen had 12-hour shift responsibility for processing employees. Accordingly, processing employees answered to two supervisors during their 16-1/2-hour shifts.

B. Respondent's Change of Working Conditions and Employee Response

A day or two after *the Phoenix* left Seattle for Alaska, Hermens met with the factory crew and informed them they would be working shifts lengthened by one-half hour.[8] At that time, no processing employee protested the change or availed himself of the following problem-review procedure set forth in the employee information booklet with which all employees were provided:

Discuss your problem or concerns with your immediate supervisor, foreperson or manager. If

you feel your supervisor is not responsive, you have the right to appeal to higher levels of supervision, ultimately to the Captain.

If your problem cannot be resolved on board the vessel, you may contact the Premier Pacific office in Seattle, which will serve as final authority.

After some days of working the additional one-half hour, the processing employees discussed their dissatisfaction with the longer shifts among themselves; several spoke to Rojas, day-shift assistant foreman, of their concerns that the lengthened shifts caused increased fatigue and consequent safety hazards. Several employees also protested to Rojas that the changed schedule prevented their being occasionally assigned to work 4 hours per shift on the "gut line," a less arduous duty post. Rojas spoke to Hermens and Octaviano about employees' concerns. Octaviano told Rojas to leave matters as they were, which Rojas reported to employees.

Following Rojas' response, in late January, processing employees circulated and obtained at least 66 employee signatures on the following petition (the petition) addressed to Hermens:

Pat,
We have been most upset with the 16.5-hour shift. During the signing of our contracts we were informed that our shift would be 16 hours long. That leaves us with 8 hours to sleep, eat, take a shower, brush teeth, shave, et cetera. Taking away 30 minutes or 1/16 of our time off has had a

drastic effect on our ability to perform our duties at work and afterwards. If you were to restore our 30 minutes, I think you would find that your crew would be more refreshed to work harder and finish the season successfully. We are all more than willing to pull together to see that no one has to work more than 16 hours in a day.

Rojas observed employees signing the petition; he told Octaviano of the petition and that employees seemed unhappy-probably about the added one-half hour. He recommended that management talk to employees. Octaviano told Rojas not to worry about it. Several days prior to February 2, in a staff meeting, the ship's medic told Captain Smith that a petition was circulating among the processing employees presumably having to do with the extended shifts. Captain Smith told the medic that the ship was not a democracy and did not do business by petition. Employees Luis Verduzco Jr. and Noel Cornelio reported to employees that they had given the petition to the ship's purser, who said she would give it to Hermens.[9] Although both Captain Smith and Hermens heard rumors of an employee petition, neither saw it nor spoke to the processing employees regarding it.

C. February 2 Termination of Processing Employees

*16 On February 2, decreased fish delivery to *the Phoenix* caused a lull in processing. As usual, during the processing downtime, Rojas directed the day-shift processing employees to perform a thorough machine and factory cleanup. At about 4 p.m., Respondent estimated that processing would commence at 7 p.m.,

and Rojas planned completion of cleaning to accommodate a 7 p.m. processing start time. Thereafter, seriate postponements to 8 p.m. and to 9 p.m. were announced.[10] During the waiting period, employees discussed the fact that Respondent had not responded to the petition and composed another document entitled, "The Voice of the People" (the Voice of the People letter), which read:

> We have heard that you (management can't come with a conclusion about the 16 hrs. So we have come with the conclusion to work 17 hrs. if *all* [foremen], assistant foreman, surimi techs and the rest of the 12 hrs. shift personnel works 17's also. But not working in the office, they should work in the factory like the rest of the processors. In the Toyo's, case up, freezer, plates, etc. We feel that is *not* fair for *us [t]*he people [who] are working being on our 16 hrs. for office management to just be sitting around, when we can't have enough time to rest, and be ready for the next day. You expect us to work harder and get the job done faster, well with more people "*experienced*" people like, assistants, foreman, etc. we can do the job better, go home faster, and not feel left out to do everything by ourselves. Do not blame the people for what is happening. Blame the management 16 1/2.
> We need an answer as soon as possible either by today or first thing in the morning.
> Sin. The people.

Shortly before 7:30 p.m.,[11] Luis Verduzco Sr. gave the Voice of the People letter to Octaviano and asked him to give it to Hermens. Octaviano left the area,

and a few minutes later summoned Luis Verduzco Sr. to the office. When he arrived, Luis Verduzco Sr. found Hermens, Aldano, Rafferty, and Singer present. Hermens had the Voice of the People letter in his hand and, with Octaviano interpreting, asked, "What is the meaning of this?"

Luis Verduzco Sr. said it was a letter from the people. Hermens asked who had written the letter. When Luis Verduzco Sr. repeated that "the people" had, Hermens asked if Luis Verduzco Sr. was sure his son had not written it, which Luis Verduzco Sr. denied. Luis Verduzco Sr. declined to tell Hermens who had authored the letter "because[he] knew [Mr. Hermens was looking for someone to be guilty." Hermens denied he had asked who wrote the letter, saying he had only inquired as to whom he should talk about it, although he admitted that Luis Verduzco Sr. "did not want to tell [him] ... who had written [the letter]." I credit the account of Luis Verduzco Sr., whose testimony Octaviano essentially corroborated. Additionally, Rafferty testified that Hermens was enraged by the letter and sought to ascertain its author because he wanted accountability. Hermens directed Rafferty to find out who the "ringleaders" were, which further supports Luis Verduzco Sr.'s testimony that Hermens attempted to glean the same information from him.

*17 According to Luis Verduzco Sr., Hermens said he would make time to speak to the employees. Hermens testified that be only expressed a willingness to talk about the employees' issues when the factory did not have fish to process. After consideration of the surrounding circumstances as

well as the witnesses' demeanor, I find that Hermens did not agree to meet with the protesting employees at that time but only at some indefinite, future occasion. I also find that Luis Verduzco Sr. believed in good faith that Hermens intended to meet with the employees that evening.

Luis Verduzco Sr. returned to the employees and told them that Hermens had agreed to speak to them. The employees asked Estrada, who had replaced Rojas as supervisor at about 7:50 p.m.,[12] to see if Hermens had time to speak to them at that time. According to Luis Verduzco Sr., Estrada returned with a message to the employees that management was waiting for them in the office. Estrada testified that he only reported to the workers that Rafferty was going to speak to Hermens and said nothing about any meeting. Nonetheless, the workers said they were all in agreement and would go together, whereupon they left the work area. I find it unnecessary to resolve what Estrada told employees regarding a meeting with Hermens. While it is clear Hermens did not intend to meet with employees at that time, it is equally clear employees sincerely believed they had been directed to meet with the manager immediately. In short, a misunderstanding occurred, even though its source remains obscure. Approximately 25-30 employees (protesting employees) left the factory work areas and proceeded to the office.

Estrada then called Rafferty and told him some of the workers wanted to speak to Hermens. Rafferty asked if it looked like a strike, and Estrada said he did not know. Rafferty said to get the factory ready to

go at 9 p.m., and he would speak to Hermens. Rafferty told Hermens a number of workers had walked out of the factory and were demanding a meeting with him. Hermens directed Rafferty to take the necessary steps to start the factory with uninvolved factory workers and substitute workers, such as engineers, mechanics, and employees who would normally perform the tail end of processing. As Rafferty set about manning the factory, he encountered about 25 of the protesting employees congregated in a passageway. According to employees Luis Verduzco Sr., Asuncion Aguirre, and Gabriel Garibay, Rafferty told them to remove their work clothes[13] and go to the library; he said all of them were fired and that he did not lose anything, rather they were the losers. Rafferty denied telling employees they were fired. According to Rafferty, he only told the group to return to work and directed those who refused to do so to go to the library and not leave it except for restroom use, on pain of termination. The employee witnesses who testified as to what Rafferty said were consistent and unequivocal in their accounts, and I accept their testimony. While the protesting employees made their way to the library, Aldano passed by, carrying a box of new work goggles for distribution to those employees who would replace the protesting machine operators. Alfonso Lopez jokingly said, "Hey, I'll trade you these [goggles]." Aldano refused, saying the new goggles were for the new machine operators. As directed, the employees went to the library, assuming they had been fired.

*18 While the employees were assembling in the library, Hermens asked Captain Smith to meet with

him in his office, saying he believed workers had walked off the job. When Hermens and Captain Smith met, they agreed that Captain Smith would talk to the employees in the library while Hermens and Rafferty reassigned employees and made arrangements to start production. Witnesses were not fully consistent as to the sequence of managerial/employee meetings that took place thereafter or as to what was said in which meeting. The following description of events is an amalgam of the most consistent and reliable testimony.

Captain Smith spoke to employees in the library and encouraged them to return to work. He told them their conduct was inconsistent with the problem review procedure set forth in the employee handbook and was not the way to raise employee concerns. Captain Smith reminded Juan Lovos that when a work stoppage among employees had occurred 2 years earlier, Respondent had told them the complaint procedures to follow.[14] Captain Smith said he would talk with them about their concerns later when the factory was out of fish. When employees did not return to work, Captain Smith considered they had quit and told them so. He directed them to sign their names on an attendance paper, and the following employees signed:

Ramon Mendez
Jose Cervantes
Winston Brown
Jorge Camacho
Fermin Taisacan
Maurisio Ramirez
Baltazar Gonzalez

Sergio Velasquez
Alfonso Flores Lopez
Jose Cabrera
Jose Luis Corona[15]
Joel M. Camacho
Asuncion Aguirre
Ruben Ruiz
Miguel Martinez
Luis Verduzco
Luis J. Verduzco Sr.
Gabriel Garibay
Ricardo Cuevas
Cesar Nieto
Juan Lovos
Noel A. Cornelio
Arturo Leon
Jose Luis Delgadillo
Alberto Rodriguez[16]
[Juan Carlos Reyes and Bradley Monaco[17]

After Captain Smith spoke to the employees in the library, he met again with Hermens for a strategy discussion. The two men believed the protesting employees had walked off the job (and hence "quit") and were attempting to hold the factory "hostage." According to Captain Smith, Respondent was willing to discuss the shift length concern with the employees, but timing was a major issue: "We wanted to [discuss the matter] after we cut fish, so we did not suffer any more economic loss." Hermens and Capt. Smith decided not to discuss work issues with the protesting employees before the employees returned to work, as they did not want to encourage the idea that walking off the job was a proper way to resolve employee concerns. They further concluded

that employees with more seniority had a greater responsibility for the employees' conduct as they served as mentors for newer employees and were more highly paid. The senior employees would not be permitted to return to work without penalty. The two managers decided they would divide the protesting employees into two groups based on seniority, and they would decline to discuss the extended shift issue but would agree to meet with employees when a lull in production occurred.

*19 After agreeing on a course of action, Hermens, Captain Smith, and Octaviano went to the library. Hermens told the protesting employees they had walked off the job. The employees disagreed, saying Hermens had directed them to talk to him. Hermens told employees he had not called any meeting; employees who thought he had were under a misunderstanding. Hermens said he did not like being held hostage and would discuss the half-hour shift increase with them at a later time. He offered to let the employees return to work without penalty and told them if they did not return to work, Respondent would assume they had quit. Cesar Nieto said the employees were not going to quit, that Hermens would have to fire them. Hermens said, "The outcome will be the same; you won't work here."

After about 30-45 minutes, Hermens divided the group, sending leadmen and employees with greater seniority to the TV room. When selected employees had left for the TV room, Hermens told the library group they had 10 minutes to get back to work. The employees said they wanted to talk about the 16-1/2-hour shifts. Hermens looked at his watch and told

the employees that he did not want to talk about the shift length and that they had only 8 minutes left in which to return to work. The employees continued to request a discussion, and Hermens said, "If you guys don't go back, you are done." Hermens left, telling the employees that when he returned, he would "finalize this."

When Hermens left the library, he went to the TV room and told that group he would give them 8 minutes to return to work. Even if they chose to return to work, he would reduce their crew share percentage by .5 percent and later deduct 10 percent from their final compensation. Hermens considered the pay reduction to be a form of disciplinary action.

After absenting himself from the TV room for 8 minutes, Hermens returned, looked at his watch, and left without speaking.[18] Except for the three employees noted above, none of the employees returned to work. The group in the TV room rejoined the group in the library.

When processing employees quit or are terminated, in Hermens' words, "they ... are no longer my responsibility. The Captain takes care of them knowing what they should and should not do, as a person who is no longer employed on *the Phoenix*, but [who is still aboard]." Having determined that the protesting employees were no longer employed by Respondent, Hermens turned the matter over to Captain Smith. Captain Smith, knowing he was "incapable of handling such a large group of people that potentially were going to be very unhappy," decided to make an unscheduled port call at Dutch

Harbor, Alaska, and debark the protesters. Captain Smith returned to the library and told the workers to get their belongings together because they were "done." Captain Smith explained certain restrictions as to when and where on the ship the alleged discriminatees could go during the time they remained aboard. The group was comprised of the following employees, hereinafter called "the terminated employees":

*20 Asuncion Aguirre (aka Aguirre Asuncion)
Winston Brown
Jose Cabrera
Joel Camacho
Jorge Camacho
Jose Cervantes
Noel Cornelio
Ricardo Cuevas
Jose Luis Delgadillo
Gabriel Garibay
Baltazar Gonzalez
Juan Lovos
Miguel Martinez
Brad Monaco
Caesar Nieto
Maurisio Ramirez
Juan Reyes
Ruben Ruiz
Luis Verduzco Sr.
Luis Verduzco Jr.
Sergio Velasquez
Arturo Leon[19]
Alfonso Lopez

The following morning, February 3, Captain Smith

again spoke to the group of workers, requesting them to sign separation papers saying they had voluntarily quit. When the workers demurred, Captain Smith told them that if they did not sign, he would drop them off at the nearest port, Dutch Harbor, Alaska, without providing for motel rooms or transportation to Seattle. The employees refused to sign, insisting they had not quit. After a radio consultation with Respondent's human resource department, Captain Smith relented.

When on the morning of February 3, Rojas learned employees he supervised had been terminated the previous evening, he asked Octaviano if he could talk to them to get them to return to work. Octaviano refused, saying Hermens had already taken care the matter.

Sometime during the morning of February 3, Arturo Leon told Hermens he had not understood what had transpired during the meetings of the previous night and asked to return to work. Hermens said he did not believe him and wished him a "nice life." Respondent gave each terminated employee a Separation Notice, which noted the following:

> Reason for Contract Termination-Quit
> Eligible for Rehire?-NO

On the evening of February 3, the terminated employees debarked at Dutch Harbor, Alaska, where they were provided with funds and air transportation to Seattle. Respondent had experienced no behavioral problems with the group during the period of walkout through debarkation.

A few days following February 3, Hermens held a meeting with the remaining factory employees. He told them that some workers had tried to hold the company hostage and to force him to do what they wanted. He said he did not like that. He asked by a show of hands, which employees wanted to work the 16-1/2-hour shifts, and all employees raised their hands. On about February 9, Respondent replaced the terminated employees.

D. Termination of Ulysses Nieto

Respondent's handbook prohibits sleeping on the job:

GENERAL WORK RULES

> You are expected to comply with [the General Work Rules], as defined by the following list.... Violators are subject to discharge, or lesser disciplinary action, depending upon the gravity of the offense as determined by the Owner, for the following infractions:
>
> ....
>
> 7. Sleeping while on duty.

During *the Phoenix*'s voyages, it was a common practice for processing workers to sneak into their or other employees' rooms during worktime to nap. The workers sometimes exchanged room keys to foil detection, relying on other workers to warn them when supervisors began searching for them. Respondent's normal practice was to warn employees for a first offense.

*21 Following the events of February 2, Hermens

wanted to get rid of the "spies" among the employees, hoping thereby to avoid recurring strikes. Hermens believed many of the troublemakers came from the Washington town of Wenatchee, and he wanted to get rid of Wenatchee residents as well.

Ulysses Nieto (Nieto), resident of Wenatchee and brother to Caesar Nieto who was terminated on February 2, remained on the ship after the terminated employees disembarked in Dutch Harbor. In the days after February 2, Nieto discussed with other employees the increased work demands necessitated by the shortage of workers Certain employees decided to ask for a raise. On February 15, several spoke to Rojas and requested a meeting with Hermens. Later that day, during a cleaning period, employees met with Hermens and Captain Smith in the library. Nieto spoke for the workers, explaining that employees believed the increased work and shorter breaks were unfair and hazardous and complaining that Rafferty pushed the employees too hard. He asked for raises.

Hermens told the employees that at end of the trip he would figure out who would get a raise for the next trip and how to reward employees. Hermens agreed to increase the crew share percentage for two employees, one of whom was Nieto. The employees expressed dissatisfaction with the plan but returned to work.

Upon returning to his cleaning work, Nieto felt ill and went to his room to get aspirin without informing his supervisor, Rojas, who did not notice he had left. While in his room, Nieto fell asleep on

the floor for 20 minutes. During that time, Estrada notified Rafferty that Nieto, whom he had been seeking for 10-15 minutes, was missing from the work area.[20] Rafferty walked through the factory without finding Nieto. Suspecting Nieto was in his room, Rafferty went there and found him asleep on floor. Although Hermens was the only manager with authority to discharge processing employees, Rafferty told Nieto he was fired because he knew Hermens would fire him when he learned he had been sleeping on the job. Thereafter, Hermens approved Nieto's discharge.

There is no evidence Respondent bad ever warned Nieto about sleeping on the job prior to February 15.[21] Although Rafferty testified that Nieto had "an extensive history of missing on shift," that he had orally warned him for sleeping on a pile of sugar, and that Nieto was "always on the verge of being in trouble," I cannot accept his testimony. Nieto's last performance evaluation for "A" season of 2002, which was approved by Rafferty, shows him to have earned 9 "excellent" ratings out of 10 in such areas as "positive attitude," "follows directions," "returns to work promptly after breaks," and "works rapidly." Written evaluation comments note Nieto to have been "one of the best, very motivat[ed] and active person ... one I depend [on] to show good production because he cares about the job."

E. Termination of Sebastian Cortez

*22 Cortez did not testify, but Hermens' testimony along with evidence contained in emails generated by Hermens provide the facts surrounding Cortez'

discharge. After February 2, Cortez talked to other employees about his dissatisfaction with the wages paid by Respondent and his belief that he could make more money under less severe working conditions on another catcher/processor boat. When Hermens learned of Cortez' interchanges with other employees, he asked Cortez not to spread his unhappiness. When Cortez was again observed "being unhappy," Hermens "completed" Cortez' contract (i.e., terminated him midcontract) on February 16. Hermens explained his motivation in an email to Respondent's human resources office dated March 13:

> I completed [Mr. Cortez'] contract because he was quite unhappy here and rather vocal about his unhappiness and how he thought he could [make] much more money with an easier schedule elsewhere. He told me that he did not want to go home that he wanted to stay. It was the wrong time to keep a malcontent on board.

V. DISCUSSION

A. Jurisdiction

Respondent contends that the Board lacks jurisdiction to afford relief to the terminated employees as "seamen" have no right under the Act to engage in the concerted activity of a work stoppage on a vessel in operation on the seas, the governance of which maritime law controls. On August 30, 2004, Respondent filed with the Board a motion to dismiss the complaint, contending that the protesting employees' actions were tantamount to criminal

conduct under 18 U.S.C. §§ 2192 and 2193, which prohibit revolt or mutiny. By. order dated October 20, 2004, the Board denied Respondent's motion stating that Respondent bad "failed to establish that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law." At the hearing, Respondent again moved to dismiss the complaint on grounds that the Board lacks jurisdiction over the subject matter herein. The Board has asserted jurisdiction over employers engaged in fish processing at sea. *Employees Negotiating Committee (Western Boat Operators, Inc.)*, 177 NLRB 754 (1968); *American Freezerships, Inc.*, 135 NLRB 1113 (1962); *Pacific American Fisheries, Inc.*, 124 NLRB 9 (1959). Further, for the reasons set forth below, I find the Board has jurisdiction to review Respondent's actions herein and to remedy any violations found.

B. Alleged Violations of Section 8(a)(1) of the Act

1. Interrogation

Respondent's processing employees engaged in protected concerted activities within the meaning of Section 7 of the Act when they discussed their objections to Respondent's one-half-hour extension of their work shifts, prepared the "Voice of the People," and, on February 2, presented it to factory manager, Hermens, and sought a meeting with him to discuss their grievances. See *NLRB v. City Disposal Systems, Inc.*. 465 U.S. 822, 831 (1984). Respondent argues that application of *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964), exculpates Hermens' questioning of Luis Verduzco Sr. as to who had prepared the protest

letter. However, Hermens' interrogation does not meet the *Bourne* requirements that the employer have a valid purpose in seeking the information, which purpose the employer communicates to the employee. Here, Hermens' purpose, as explicated by the testimony of Rafferty, was to ascertain the ring-leaders behind the letter in order to hold them accountable, and that unlawful purpose was clearly understood by Luis Verduzco Sr. who testified that he knew Hermens was "looking for someone to be guilty." In these circumstances, Hermens engaged in unlawful interrogation of Luis Verduzco Sr. in violation of Section 8(a)(1) of the Act. See *Guess?, Inc.*, 339 NLRB 432 (2003).

2. February 2 termination of fish processors

*23 The General Counsel alleges in the complaint that Respondent terminated 21 of the protesting employees for engaging in protected concerted activities and by so doing violated Section 8(a)(1) of the Act. Although Respondent has consistently characterized the terminations as voluntary quits, by telling the terminated employees on February 2 that they were "done," by informing them that Respondent considered them to have quit, and by noting their ineligibility for rehire, Respondent clearly discharged them. *Matador Lines, Inc.*, 323 NLRB 189 fn 2 (1997); *Indian Hills Care Center*, 321 NLRB 144, 154 (1996) (assertion that an employee's conduct constitutes a resignation or quit suggests the employer regarded conduct and continued employment to be incompatible).

The General Counsel failed to include in the

complaint the names of Sergio Velasquez and Arturo Leon who participated in the same concerted protected activity and received the same consequences as the 21 alleged discriminatees. The General Counsel did not name the two employees because they had inadvertently been omitted from the group listed in the unfair labor practice charges herein, and the General Counsel did not become aware of the omission until after the 10(b) period had elapsed.[22]

Notwithstanding the General Counsel's failure to seek amendment of the complaint to include the names of Sergio Velasquez and Arturo Leon, I find it appropriate to consider the legality of Respondent's conduct toward all protesting employees who were terminated on February 2. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.[citations omitted]." *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 fn. 5 (2004). The issues regarding the terminated employees were fully litigated, and Respondent's motivation was the same as to all of them. My otherwise untimely inclusion of Sergio Velasquez and Arturo Leon as discriminatees is appropriate as their terminations are inextricably connected to the timely alleged terminations of the alleged discriminatees, involve the identical underlying legal theory and factual situation, and are subject to the same employer-raised defenses. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988); *Precision Concrete*, 337 NLRB 211 (2001). See also *Peng Teng*, 278 NLRB 350 fn. 2 (1986) (Board left to compliance stage determination

of identities of two individuals inadvertently omitted from the complaint). Accordingly, I have considered whether Sergio Velasquez and Arturo Leon along with the 21 alleged discriminatees were unlawfully terminated as alleged in the complaint.

*24 Prior to their work stoppage of February 2, Respondent's employees discussed shift length dissatisfaction, drafted a protest petition and a protest letter, and sought a meeting with management. All of those actions were protected and concerted.[23] Any discipline, including termination, of employees for engaging in such protected concerted activities violates Section 8(a)(1) of the Act. *Accel, Inc.*, 339 NLRB 1052 (2003). However, Respondent did not discipline any employee because they engaged in any of the enumerated, protected activities. While it is true Rafferty explicitly and Aldana implicitly told the protesting workers they were fired, their statements do not establish discharge. Neither Rafferty nor Aldana had authority to terminate any employee, and Hermens and Captain Smith's later statements to the protesting employees make it clear that Respondent had no intention, at least initially, of firing the protesting employees. Although Hermens was clearly angered by the employees' conduct in pressing for a discussion about their extended shift hours, Respondent repeatedly urged the protesting employees to return to work without incurring any penalty. There is no evidence to suggest that the employees' tenure of employment would have been affected in any way had they returned to work when directed to do so. Accordingly, I find Respondent did not terminate, or otherwise discipline, any of the

processing employees on February 2 for discussing with one another their 16-1/2-hour shifts, drafting the petition and the protest letter, seeking a meeting with management, or any other protected, concerted activity they may have engaged in prior to refusing to return to work.

When the protesting employees refused to return to work as directed by Respondent until they had aired their grievance over increased shift hours, they engaged in a work stoppage or a strike. Had the work stoppage herein occurred among factory employees in a shoreside setting, there is no question it would have been protected under the Act. In *Benesight, Inc.*, 337 NLRB 282 (2001), unrepresented customer service employees protested newly imposed work procedures by ceasing to take customer calls "until they could get a resolution of their problem from management." Supra at 286. The Board held that when an in-plant work stoppage is peaceful, is focused on a specific job-related complaint, and causes little disruption of production by those employees who continue to work, employees are "entitled to persist in their in-plant protest for a reasonable period of time [citation omitted]." Supra at 282. See also *Accel, Inc.*, supra (employees who walked off their assembly line to protest the employer's denial of a scheduled work break engaged in protected activity). Here, the protesting employees sought a discussion with management of a term and condition of their employment, engaged in no insubordinate or disruptive behavior, did not attempt to set their own conditions of employment, and in no way interfered with Respondent's operations or production, except insofar as their absence from

processing lines made labor adjustments necessary. Consequently, the employees' work stoppage fits within the rights enumerated in Section 7 of the Act and constitutes concerted, protected activity. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

***25** There is no dispute as to the actions Respondent took in response to its employees' concerted work stoppage:

> 1. After initial discussion with the protesting employees on February 2 and following their refusal to return to work, Respondent divided them into two groups comprised, respectively, of more and less senior employees. Respondent once more gave each group at short time to exercise the option of returning to work, but this time Respondent informed the more senior employees that a penalty in the form of reduced compensation would be imposed. The proposed penalty constituted discipline for senior employees' participation in and encouragement of newer employees to participate in the protest.[24]
> 2. When the protesting employees declined Capt. Smith and Mr. Hermens' call to return to work, Respondent terminated them rather than simply removing them from the work situs, which Respondent was entitled to do when the employees refused to work and which Respondent did on the following day.

Respondent agrees "the charging parties here had every right to ... petition for their mutual aid or protection, and to express their dissatisfaction with the terms and conditions of their employment, so

long as they did not violate the NLRA." It follows that if the employees' work stoppage were protected by the Act, then Respondent's termination of employees violated Section 8(a)(1) of the Act. Respondent's position, however, is that the Act does not protect the work stoppage because it occurred on an ocean-going vessel at sea where the charging parties could not "usurp the Master's authority at sea, even if the Master's action would constitute an unfair labor practice on land." Respondent argues that the work stoppage and Respondent's responses to it are covered by federal maritime law and not by the Act.[25]

The Board has acknowledged that employment in the maritime industry "is uniquely subject to pervasive regulation by Federal maritime statutes, and that the Act often must be accommodated to those statutes. [Citations omitted]." *Exxon Shipping Co.*, 312 NLRB 566, 567 (1993). One such statute decrees that a seaman's willful disobedience to a lawful command at sea constitutes criminal conduct; 46 U.S.C. § 11501(4) reads in pertinent part as follows:

> When a seaman lawfully engaged commits any of the following offenses, the seaman shall be punished as specified:
>
> ....
>
> (4) For willful disobedience to a lawful command at sea, the seaman, at the discretion of the master, may be confined until the disobedience ends, and on arrival in port forfeits from the seaman's wages not more than 4 days' pay or, at the discretion of the court, may be imprisoned not more than one month.

In *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942), the United States Supreme Court held that seamen aboard a ship anchored in the Houston, Texas, harbor who were discharged for engaging in a strike while on board the vessel had engaged in conduct violative of maritime mutiny statutes and therefore were engaged in criminal conduct unprotected by the Act. See also *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351 (1971) (employer not entitled to compel arbitration of seaman's wage claim pursuant to collective-bargaining agreement in light of provisions of Federal maritime law granting seamen right to bring such actions in court) and *Mt. Vernon Tanker Co. v. NLRB,* 549 F.2d 571 (9th Cir. 1977) (seaman's rights under *Weingarten*[26] do not exist during ship's voyage). Respondent argues that the Board "lacks authority to apply the protections of the NLRA in such a way as to unlawfully interfere with the operations of a vessel at sea [or to contravene] the master's exclusive right ... to command the vessel and govern the actions of the seamen." Respondent is accurate in its statement of the law, but it is not clear that the processing employees herein are "seamen," or that their duties are analogous to those of the seamen in *Southern Steamship Co.,* supra, or other cases cited above, so as to deny to them the coverage of the Act and to require application of maritime law to their concerted activity.

***26** The Supreme Court has defined "seamen" in Jones Act[27] cases, stating "It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel ... a seaman must be

doing the ship's work ... the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status." *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 355 (1991). In *Chandris, Inc. v. Latsis,* 515 U.S. 347, 376 (1995), the Court held that the "'employment-related connection to a vessel in navigation'" necessary to qualify as a seaman under the Jones Act, comprises two basic elements: "The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation ... that is substantial in terms of both its duration and its nature [citation omitted]."

An argument could be made that any work performed aboard a vessel contributes to the function or the mission of the vessel and that any worker aboard a vessel who is connected, e.g., employed by, the vessel has a work connection to the vessel. If those premises were accepted, all individuals employed by a vessel aboard the vessel would be "seamen," and any work stoppage aboard a vessel, whether in harbor or on the open sea, would contravene the vessel's mission. Further, under that view, any work stoppage uncountenanced or forbidden by the ship's captain or master would be mutinous and unprotected by the Act. Following this line of reasoning to its logical conclusion, employers whose production can be performed shoreside may cut off their employees from vital Section 7 protections by locating their operations aboard a vessel in navigation. However, neither the Supreme Court nor any other forum has ever expressed such a

view,[28] and there are significant factual distinctions between *Southern Steamship Co.*, supra, and the instant case to militate against such a conclusion.

In *Southern Steamship Co.*, supra, the employees whose work stoppage was at issue had work duties directly related to the operation of the vessel. In *Mt. Vernon Tanker Co.*, supra, the employee who pressed his *Weingarten* rights was employed as chief pumpman of the vessel, also a job directly related to the operation of the vessel. As found by the Court in *Southern Steamship Co.*, the crew refused the captain's order to return to work, refused to leave the ship to make way for a replacement crew, and one striking crew member threatened an engineer that he would be sorry if he tried to turn on the deck steam himself. While the strikers "did not engage in violence or prevent the other men and officers from proceeding with preparations for the voyage ... they did what they could to prevent the ship from sailing." *Southern Steamship Co.*, supra at 40-41. As a practical matter, the Court found, the strikers wrested control of the vessel from its officers. *Southern Steamship Co.*, supra at 47.

*27 The employee/employer relationships focused on in *Southern Steamship Co.* and *Mt. Vernon Tanker Co.* differ significantly from those in this case. The protesting workers herein labored only in the ship's fish-processing factory and had no responsibility for the operation or movement of the ship. Although Captain Smith had ultimate responsibility for the entire vessel, an entirely different supervisory chain oversaw the factory employees' work than that which oversaw the work of the seamen operating the

vessel.[29] The employees' February 2 work cessation was neither intended to nor did it prevent the ship from functioning as an ocean-going vessel, and Captain Smith became involved in the work stoppage at the request of factory manager, Hermens. Captain Smith was not present in post-February 2 meetings between the factory workers and Hermens, and there is no evidence he had any input into resolution of their complaints. Thus, unlike the situations in *Southern Steamship Co.* and *Mr. Vernon Tanker Co.*, there is a marked separation between the protesting factory workers' duties and oversight and the operation of the vessel.

Considering all the circumstances herein, I find the terminated employees are not "seamen," and, therefore, Federal maritime statutes do not preempt their protections under the Act. Consequently, the terminated employees' refusal to obey their supervisors' directions to return to work did not constitute mutinous behavior. Further, it is immaterial that Respondent may have had a good-faith belief that the employees' conduct was mutinous. An employer violates Section 8(a)(1) of the Act by discharging or disciplining employees based on its good faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964).

Respondent also argues that the protesting employees' conduct was unprotected by the Act without regard to maritime law. Respondent analogizes the instant conduct to that of employees disseminating deliberately false statements[30] or

urging participation in an unlawful secondary boycott.[31] But the analogies are inapposite; the employees here engaged in no misconduct, unless their concerted protest, in itself, can be so characterized. Respondent argues that it can. In Respondent's view, the protesting employees engaged in unreasonable and unprotected behavior by conducting a work stoppage aboard a vessel in the open sea when a rational alternative had been offered. Respondent posits that when Hermens and Captain Smith directed employees to return to work, assuring them their concerns would be addressed at the first opportunity, the continued work stoppage lost any protection it might have had. The cases cited by Respondent to support this proposition are inapplicable. *G. W. Gladders Towing Co,* 287 NLRB 186 (1987), and *SCNO Barge Lines, Inc.,* 287 NLRB 169 (1987), both involve questions of reasonable alternatives to nonemployee labor organizers' access to crewmen, which is not at issue herein, while *Felix Industries,* 331 NLRB 144 (2000), considers whether an employee lost the Act's protection by obscene response to a supervisor, also not an issue herein. As to Respondent's contention that the workers' behavior, including their refusal to accept Respondent's offer to discuss their concerns at a more convenient time was "unreasonable," the Board has rejected the claim that "an employee protest must also employ reasonable means in order to be protected by the Act. *Co-Op City,* 341 NLRB 255 fn. 5 (2004), citing *Accel, Inc.*, supra, and *Trompler, Inc.,* 335 NLRB 478, 480 fn. 26 (2001) ("the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not"), enfd. 338

F.3d 747 (7th Cir. 2003).

***28** Respondent also contends that the work stoppage, which might "be considered protected activity in a typical land-based workplace" is unprotected because it occurred in the middle of an ocean where "it is simply not possible to readily locate replacement workers" and "interfere[d] with Respondent's legitimate business operations." Respondent's assertion that the work stoppage impacted its business is undeniable, requiring, as it did, Respondent to make unscheduled land stops to debark the strikers and later to procure replacements. Those singular circumstances are, however, irrelevant to the strike's lawfulness. The whole point of a strike is to exert economic pressure on an employer by withholding needed labor services and thereby discommoding the employer. While a strike's potential for harmful impact on an employer's business may justify certain employer actions,[32] the fact that this strike occurred in circumstances that intensified the economic impact on Respondent neither renders it unlawful nor justifies Respondent's termination of strikers. There is no evidence the protesting employees here had any object other than peacefully to pressure Respondent to discuss the shift increases with them. Their work stoppage was neither destructive nor obstructive, although it may have engendered frustration and inconvenience for Respondent, and it constituted a lawful expression of employee concerns. *Rhee Bros., Inc.*, 343 NLRB No. 80 (2004).

Under the Act, strikers retain the status of employees. While employees can be permanently

replaced for engaging in an economic strike, they may not lawfully be discharged for doing so. *NLRB v. International Van Lines,* 409 U.S. 48 (1972); *Rhee Bros., Inc.*, supra. Accordingly, I find Respondent violated Section 8(a)(1) of the Act by terminating the protesting employees for engaging in concerted protected activity.

3. Termination of Ulysses Nieto

Nieto was engaged in protected concerted activity when, on February 15, he served as spokesman for factory workers who sought increased compensation for taking on increased work loads following the February 2 terminations. *Children's Studio School Public Charter School,* 343 NLRB No. 19 (2004). Respondent's motivation in terminating Nieto on the same day is in dispute. In resolving that issue, the Board's analytical guidelines in *Wright Line*, supra, control. If the General Counsel's evidence supports a reasonable inference that protected concerted activity was a catalyzing factor in Respondent's discharge of Nieto, he has made a prima facie showing of unlawful conduct.[33] The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same decision, even in the absence of protected activity.[34] *Avondale Industries,* 329 NLRB 1064 (1999); *T&J Trucking Co.,* 316 NLRB 771 (1995). Hermens, who approved Nieto's discharge, bore patent animosity toward employees' protected activities. He wanted to rid Respondent of "spies" and troublemakers, and Nieto fit the troublemaker criteria: he was a resident of Wenatchee, from which area most of the strikers haled; he was the brother of

striker Caesar Nieto, and he engaged in the protected activity of speaking for workers seeking raises after the February 2 terminations, all of which Hermens knew. Finally, Nieto was terminated, assertedly for sleeping on the job, shortly after presenting employee demands on February 15. In these circumstances, I conclude the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in Respondent's decision to terminate Nieto. *American Gardens Management Co.,* supra. The burden of proof therefore shifts to Respondent to show that Nieto's termination would have (not just could have) occurred even in the absence of his leadership role among employees seeking post-February 2 recompense. *Avondale Industries,* supra at 1066.

***29** In assessing Respondent's evidence of lawful purpose in terminating Nieto, I recognize the fact that an employer's desire to retaliate against an employee or to curtail protest does not, of itself, establish the illegality of a termination. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries,* supra; *Klate Holt Co.,* 161 NLRB 1606, 1612 (1966). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems,* 330 NLRB 1170, 1171 fn. 6 (2000), and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's

proffered reasons for disciplinary action are the actual ones. Ibid. The question here is whether Respondent terminated Nieto because he slept when he should have been working or because he was a high-profile protester.

Direct evidence of unlawful motivation is seldom available, and unlawful motivation may be established by circumstantial evidence, the inferences drawn therefrom, and the record as a whole. *Tubular Corp. of America,* 337 NLRB 99 (2001); *Abbey Transportation Service,* 284 NLRB 689, 701 (1987); *Shattuck Denn Mining Corp.;* 362 F.2d 466, 470 (9th Cir. 1966). Indications of discriminatory motive may include expressed hostility toward the protected activity,[35] abruptness of the adverse action,[36] timing,[37] disparate treatment,[38] and/or departure from past practice.[39] Here, there is no overt evidence of union animus directed specifically toward Nieto, but circumstances exist from which it is reasonable to infer animus. Hermens hoped to avoid recurring strikes by ridding the factory of "spies" and troublemakers, which strategy Rafferty was well aware of. Since Nieto had just led an employee push for increased wages, it is reasonable to infer that Respondent considered him an activist, or, in Hermens' view, a troublemaker. Respondent's work rules forbade sleeping while on duty, but Nieto's filching a few minutes of illicit sleep was not an uncommon infraction of Respondent's work rules, and the rules provide for discharge or "lesser disciplinary action" depending on the "gravity of the offense." In fact, Respondent normally warns employees for a first offense of sleeping on the job. Nevertheless, when Rafferty saw Nieto sleeping, he

abruptly fired him, contrary to Respondent's normal practices. Respondent has neither satisfactorily explained why Rafferty, rather than Hermens, fired Nieto nor clarified why Nieto's sleeping on the job was so much graver than other employees' similar conduct so as to require termination rather than warning.[40] Both departures from past practice suggest unlawful considerations motivated the discharge. Moreover, in spite of Nieto's prior excellent performance evaluation, Respondent attempted to portray him as a marginal employee who was "always on the verge of being in trouble." Respondent's attempt to distort or misrepresent Nieto's employment history further suggests improper motivation in terminating him. Accordingly, I find Respondent violated Section 8(a)(1) of the Act by terminating Nieto for engaging in concerted protected activity.

4. Termination of Sebastion Cortez

***30** Respondent terminated Cortez on February 16 because he complained to other employees about wages and the processors' arduous schedule. Respondent argues that Cortez was not engaged in protected activity because he was "simply complaining and spreading misinformation to his fellow workers." While griping about a purely personal concern is not ordinarily considered action undertaken for mutual aid or protection, voicing concerns that pertain to working conditions affecting other employees as well as the complaining worker is protected by Section 7 of the Act. *Alaska Ship & Drydock, Inc.*, 340 NLRB 874 fn. 1 (2003) (maintenance of a policy banning wage discussion

without sufficient business justification violates the Act). Moreover, the Board considers that "the truth or falsity of an employee's communications to others generally is immaterial to the protected nature of the activity [citations omitted]." *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176 fn. 9 (1997).

Terminating an employee for complaining about working conditions violates 8(a)(1). *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995). Accordingly, I find Respondent's termination of Sebastion Cortez violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act on February 2 by interrogating Luis Verduzco Sr.

4. Respondent violated Section 8(a)(1) of the Act on February 2 by discharging the following employees because they engaged in protected concerted activities:

Asuncion Aguirre
(aka Aguirre Asuncion)
Winston Brown
Jose Cabrera
Joel Camacho

Jorge Camacho
Jose Cervantes
Noel Comelio
Ricardo Cuevas
Jose Luis Delgadillo
Gabriel Garibay
Baltazar Gonzalez
Alfonso Lopez
Juan Lovos
Miguel Martinez
Brad Monaco
Caesar Nieto
Maurisio Ramirez
Juan Reyes
Ruben Ruiz
Luis Verduzco Sr.
Luis Verduzco Jr.
Sergio Velasquez
Arturo Leon[41]

5. Respondent violated Section 8(a)(1) of the Act on February 15 by discharging Ulysses Nieto because he engaged in protected concerted activities.

6. Respondent violated Section 8(a)(1) of the Act on February 16 by discharging Sebastion Cortez because he engaged in protected concerted activities.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(l) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in

certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

*31 Respondent having unlawfully discharged the above-named employees, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[42]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

The Respondent, Phoenix Processor Limited Partnership, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating Luis Verduzco Sr.

(b) Discharging employees because they engage in protected concerted activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 clays from the date of this Order, insofar as it has not already done so, offer the following employees (the discharged employees) full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:[44]

Asuncion Aguirre
(aka Aguirre Asuncion)
Winston Brown
Jose Cabrera
Joel Camacho
Jorge Camacho
Jose Cervantes
Noel Cornelio
Ricardo Cuevas
Jose Luis Delgadillo
Gabriel Garibay
Baltazar Gonzalez
Alfonso Lopez
Sebastion Cortez
Juan Lovos
Miguel Martinez
Brad Monaco
Caesar Nieto
Maurisio Ramirez
Juan Reyes
Ruben Ruiz
Luis Verduzco Sr.
Luis Verduzco Jr.
Sergio Velasquez
Arturo Leon
Ulysses Nieto

(b) Make the discharged employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful discharges of each of the discharged employees and thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its office in Seattle, Washington, copies of the attached notice[45] marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any

other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 2, 2003.

*32 (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, at San Francisco, CA: February 4, 2005

[1] All dates are 2003, unless otherwise specified.

[2] At the hearing, counsel for the General Counsel amended the complaint to allege the following individuals employed by Respondent in the following positions as supervisors of Respondent within the meaning of Sec. 2(11) of the Act, and/or agents acting on behalf of Respondent under Sec. 2(13) of the Act:

Juan Aldana	foreman
Jose Rojasassistant	foreman
Jeff Singerassistant	foreman
Esteban Berrera	assistant foreman

Respondent admitted Juan Aldana, Jose Rojas, and Esteban Berrera were supervisors within the meaning of the Act but denied agency status and denied Jeff Singer was either a supervisor or an agent of Respondent.

The parties also stipulated that at all material times, Premier Pacific Seafoods, Inc. (Premier) and Corine Seitz, human resource director for Premier have served as Respondent's agents within the meaning of Sec. 2(13) of the Act.

[3] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony. The General Counsel's unopposed posthearing motion to correct the transcript is granted. The motion and corrections are received as ALJ Exh. 1.

[4] The industry also has a Haike season that takes place in the springtime. *The Phoenix*, however, has not participated in that season for a few years.

[5] Respondent maintains the increased shift is consistent with the employee handbook, which states, "A standard work day consists of 12 to 16 hours within a 24-hour period," contending that the one-half hour lunchbreak is not part of the shift time. It is clear, however, the overall shift time increased

by one-half hour.

[6] Respondent denied Jeff Singer, assistant foreman, was a supervisor and/or agent within the meaning of the Act. The General Counsel bears the burden of proving supervisory/agency status. *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001), which he has not met as to Jeff Singer.

[7] Rojas, who testified under subpoena by the General Counsel, voluntarily terminated his employment following "A" season, 2003.

[8] It was only after *the Phoenix* left Seattle that Captain Smith learned the processing shifts would be lengthened by one-half hour.

[9] Neither Luis Verduzco Jr. nor Noel Cornelio testified. Hearsay testimony regarding delivery of the petition to the purser was not received for the truth of that matter but only for establishing employees' beliefs regarding petition delivery.

[10] The first delivery offish on February 2 arrived about 3 p.m. According to Hermens, "cutting four-hour fish is a little young," and the processing time was accordingly delayed.

[11] I have based the timing of this meeting on Hermens' testimony that immediately after meeting with Luis Verduzco Sr. regarding the letter, he held a regularly scheduled 7:30 p.m. management meeting.

[12] Rojas retired to his accommodations and did not

learn of ensuing events until the following morning.

[13] Work gear consisted of rubberized boots, bibs, and jackets and was called "raingear."

[14] During "A" season of 2001, factory employees engaged in a work stoppage to protest insufficient work breaks. The dispute was resolved after intervention of the captain; the employees returned to work with a 2-day pay penalty and an adjusted break schedule. Employees were admonished by the captain, in writing, of the proper chain of command with which to address concerns: "direct supervisor, assistant foreman, foreman, assistant factory manager, factory manager and finally Captain. [If necessary] contact the personnel office in Seattle."

[15] At some point during the evening of February 2, Ramon Mendez, Fermin Taisacan, and Jose Luis Corona returned to work without penalty.

[16] It is not clear what happened to Alberto Rodriguez. His name does not appear on the list of employees who debarked in Dutch Harbor, Alaska, as detailed later, but there is also no evidence he returned to work.

[17] Juan Carlos Reyes and Bradley Monaco were present in the library but did not sign the paper; their names were later added to the attendance sheet.

[18] According to Jose Cervantes, when Hermens returned to the TV room, he said, "You guys still here? You are fired." In absence of corroboration, I

discount this testimony.

[19] Sergio Velasquez and Arturo Leon, although terminated, are not named in the complaint as their names were inadvertently not included in the charges filed herein. Arturo Leon has since been reemployed by Respondent. As noted above, the status of Alberto Rodriguez is unclear.

[20] Estrada testified he had been looking for Nieto for nearly an hour. I reject his testimony as it conflicts with both Rafferty's estimate of a shorter period and Nieto's testimony.

[21] Following the hearing, Respondent moved to reopen the record for receipt of statements from two of Nieto's coworkers, which arguably corroborated Rafferty's testimony that Nieto had a history of entering others' rooms during worktime to sleep. The statements are dated February 20, 5 days after Nieto's termination; as they provide no evidence of prior discipline, I declined to reopen the record.

[22] As noted earlier at fn. 17, it is possible that Alberto Rodriguez was also one of the terminated employees. Accordingly, my conclusions as to Sergio Velasquez and Arturo Leon apply also to Alberto Rodriguez if, at the compliance stage, it is determined he was one of the terminated employees.

[23] Although Respondent argues that the "reasonableness of the charging parties' complaints about their working hours" is at issue, as long as employee complaints are not made in bad faith, of which there is no evidence here, their reasonableness

is not relevant to a determination of whether the employees' conduct is protected under the Act. *Palco*, 325 NLRB 305, 307 (1998); *St. Barnabas Hospital*, 334 NLRB 1000 (2001).

[24] The General Counsel did not allege Respondent's threat to impose discipline on senior protesters or its February 3 threat to leave the strikers stranded if they did not sign separation papers stating they had voluntarily quit, as violations of the Act. Therefore, I make no findings with regard to that conduct.

[25] As Respondent's motivation is undisputed, it is unnecessary herein to apply the Board's analytical guidelines in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 US. 989 (1982). *La-Z-Boy Midwest*, 340 NLRB 80 (2003).

[26] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[27] 46 App. U.S.C.A. § 688.

[28] The Court in *Southern Steamship* stated, "It should be stressed that the view we have taken here does not prevent the redress of grievances under the Act." 316 U.S. at 48.

[29] Indeed, Captain Smith was so removed from factory oversight that, like the processing employees, he did not learn of their shift length increase until after *the Phoenix* left Seattle.

[30] *Sprint/United Management Co.*, 339 NLRB 127 (2003).

[31] *Electronic Data Systems Corp.*, 331 NLRB 343 (2000).

[32] See, e.g., *NLRB v. Brown Food Store*, 380 U.S. 278 (1965) (inventory stockpiling, work transferal, etc.), and *Harter Equipment, Inc.*, 280 NLRB 597 (1986), enf. sub. nom. *Operating Engineers Local 825 v. NLRB*, 829 F3d 458 (3d Cir. 1987) (employer lockout).

[33] "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [citation omitted]." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

[34] A "'preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. *McCormick on Evidence*, at 676-677 (1st ed. 1954)

[35] *Mercedes Benz of Orland Park.*, 333 NLRB 1017 (2001).

[36] *Dynabil Industries,* 330 NLRB 360 (1999).

[37] *McClendon Electrical Services,* 340 NLRB 613 fn. 6 (2003); *Bethlehem Temple Learning Center,* 330 NLRB 1177 (2000).

[38] *In re NACCO,* 331 NLRB 1245 (2000).

[39] *Sunbelt Enterprises,* 285 NLRB 1153 (1987).

[40] While Respondent contends Nieto's lack of remorse and history of similar conduct justify termination, as noted earlier I have not credited the proffered supporting evidence.

[41] The question of whether Alberto Rodriguez should be included in this group of discharged employees is left to the compliance stage.

[42] Ulysses Nieto was incarcerated at the time of the hearing. The question of what remedy he is entitled to is left to the compliance stage.

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[44] The question of whether Alberto Rodriguez is entitled to any remedy herein is left to the compliance stage.

[45] If, at the compliance stage, it is determined that

Alberto Rodriguez was one of the group of employees unlawfully terminated on February 2, 2003, his name is to be added to the list of employees on the Appendix.

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

*33 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT discharge any of you for protesting working conditions or for engaging in a protected work stoppage.

WE WILL NOT interrogate you about protesting working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Asuncion Aguirre
(aka Aguirre Asuncion)
Winston Brown
Jose Cabrera
Joel Camacho
Jorge Camacho
Jose Cervantes
Noel Cornelio
Ricardo Cuevas
Jose Luis Delgadillo
Gabriel Garibay
Baltazar Gonzalez

Arturo Leon
Alfonso Lopez
Juan Lovos
Miguel Martinez
Brad Monaco
Caesar Nieto
Ulysses Nieto
Maurisio Ramirez
Juan Reyes
Ruben Ruiz
Luis Verduzco Sr.
Luis Verduzco Jr.
Sergio Velasquez
Sebastion Cortez

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the above employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.